Filed 3/16/10 P. v. Talimalie CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ETEROMA TALIMALIE, Defendant and Appellant.	F058285 (Super. Ct. No. BF126325A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Dawson, Acting P.J., Hill, J. and Kane, J.

Eteroma Talimalie (appellant) appeals, challenging the sentence imposed after his no contest plea to assault with a firearm and admission of a prior felony conviction and two separate prior prison terms. Appellant contends the trial court abused its discretion in imposing the upper term for the assault. We find no abuse of discretion and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Appellant entered into a plea agreement, under the terms of which he pled no contest to count 5, assault with a firearm (Pen. Code, § 245, subd. (a)(2)).[1] He also admitted the truth of the allegation that he had a prior felony conviction (§§ 667, 1170.12) and two prior prison terms (§ 667.5, subd. (b)). The plea agreement stipulated a prison term of no more than 10 years. In consideration for the plea, the prosecutor agreed to dismiss charges for kidnapping (count 1), first degree robbery (counts 2 and 3), first degree burglary (count 4), carrying a concealed weapon (count 6) and participation in criminal gang activity (count 7), as well as the gang enhancement allegation attached to count 5. The trial court sentenced appellant to the upper term of four years for the assault, which was doubled pursuant to the three strikes law, and further enhanced the sentence with 2 one-year enhancements for the prison priors, for an aggregate term of 10 years.

The crime in this case[2] occurred on September 25, 2008, when appellant and his girlfriend drove to Arthur Harris's house. There, appellant got out of the vehicle, brandished a gun, and ordered Harris to the ground. Appellant took $12 from Harris's wallet in his back pocket. Appellant then took Harris into the house where he took a $100 bill off the top of a dresser. Appellant returned to the garage with Harris, where a person with a sawed-off shotgun was waiting. Harris pled with both assailants not to

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] The facts are taken from the preliminary hearing transcript and the probation report.

shoot him. Appellant and the other person fled. Appellant was arrested the following day.

DISCUSSION

Appellant contends the trial court abused its discretion when it imposed the upper term of four years on the assault charge rather than the middle term of three years. (See § 245, subd. (a)(2).) He argues that the trial court failed to adequately consider mitigating factors, specifically his considerable support from family and friends and the fact that he had attended college and had been gainfully employed for a short time. Appellant also contends the trial court improperly relied on his insistence that he was innocent as a factor in aggravation. We have reviewed the sentencing record and are satisfied the trial court acted well within its discretion in selecting the sentence in this case.

Trial courts enjoy broad discretion in selecting among sentencing options. It is the trial court's role to weigh the aggravating and mitigating factors to determine the appropriate sentence for a given crime. (*People v. Bolton* (1979) 23 Cal.3d 208, 216; *People v. Roe* (1983) 148 Cal.App.3d 112, 119-120.) A single aggravating factor is sufficient to support an upper term sentence. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.) Sentencing decisions are reviewed for an abuse of discretion and will be set aside only where the sentence is based on irrelevant factors, or where it is arbitrary and capricious. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.) The fact that different judges may weigh the factors in aggravation and mitigation differently does not demonstrate abuse of discretion. Rather such differences only illustrate the breadth of the trial court's discretionary power.

In this case the trial court considered the facts of the offense, the probation officer's report, and the factors in mitigation as submitted and argued by defense counsel. At sentencing, the trial court specifically stated it had considered the "10-page probation report," as well as a document and supplemental document that contained letters from

appellant's mother, pastor, fiancée, several other individuals, and appellant himself. The court also considered a letter from "All Called to Service Ministry," an organization where appellant volunteered, and another organization which offered appellant three hours of counseling per week. Defense counsel argued for the middle term, noting that appellant had a GED, attended a community college for seven months, and has had several jobs. Counsel also noted that appellant had apologized for the event, as stated in the probation report, and that he had good support from family and friends. The prosecutor argued that appellant had not really apologized, instead he claimed he was not involved. The probation report states that, when asked if he wanted to make a statement, appellant replied, "'This incident that occurred I am innocent. I took the deal so my girlfriend could go free. I apologize.'" The prosecutor also noted the serious nature of the circumstances of the current offense and that appellant was on parole at the time.

In imposing the upper term, the trial court stated:

> "I do note that [appellant] was born February of 1980. Soon after he turned 18, in San Diego, he picked up his first felony, [Health and Safety Code section] 11351.5, three years felony probation. He violated that probation at least twice. [¶] He was sent to prison on it in '99, when he was 19. Three years, CDC, was discharged in '01. [¶] He was out approximately three years when he picked up the [Penal Code section] 246[3] in San Diego. [¶] So he would have been still a young man. Sentenced to five years in the joint, paroled in '07, violated parole in '08. Paroled again in April of '08, and then a parole hold placed because of this case. [¶] [Appellant] stands there 29 years old and apparently trying to do life in prison on the installment plan. [¶] I did have the opportunity to read all of [appellant]'s documents in mitigation and all the letters. He's got plenty of people behind him, plenty of people who care about him, and obviously plenty of people who love him and encourage him. But I have to reconcile that with the fact it seems like he can't be out of prison any more than a couple of years and picks up another case. And at this time they're getting more and more—246 is bad enough, but now we've got [a Penal Code section] 245, a weapon strike, and the two prison priors. [¶] [Appellant's] statement is [] he doesn't admit to doing the crime. He just did it so he could keep his girlfriend free. He still feels he is innocent. [¶] Based on

[3] Section 246 proscribes shooting at an inhabited house or vehicle.

> the serious nature of this offense and as well as the fact that [appellant] was released on parole regarding the conviction for … Section 246, approximately five months before this offense, the Court does not feel that the candidate is a suitable candidate for felony probation. A prison sentence will therefore be recommended."

It is clear from the record that the trial court fully considered the many factors argued by both the prosecutor and the defense, and then reached a reasonable assessment of their relative weight. The fact that another judge might have weighed them differently does not demonstrate that this trial judge abused his discretion.

DISPOSITION

The judgment is affirmed.